E. R. Industries, Inc. *and* International Union of United Automobile Workers, AFL–CIO. Cases 3–CA–19196, 3–CA–19218, 3–CA–19284, and 3–CA–19487

March 15, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon charges filed by the International Union of United Automobile Workers, the Union, on February 24, March 6, April 6, and July 13, 1995, the General Counsel of the National Labor Relations Board issued an order consolidating cases, consolidated complaint, and notice of hearing on August 31, 1995, against E. R. Industries, Inc., the Respondent, alleging that it had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charges and the consolidated complaint, the Respondent has failed to file a proper answer.

On October 6, 1995, the General Counsel filed a Motion for Summary Judgment. On October 11, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response asserting that the General Counsel's motion should be denied, and the General Counsel subsequently filed a motion to partially strike the Respondent's response to the Notice to Show Cause, to strike the Respondent's answer, and a statement in opposition to the Respondent's response.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, ''all the allegations in the consolidated complaint shall be considered to be admitted and shall be so found by the Board.'' Section 102.20 also states that the answer should specifically admit, deny, or explain each of the facts alleged in the complaint unless the respondent is without knowledge, in which case it shall so state.

The undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated September 15, 1995, notified the Respondent that unless an answer was received by September 22, 1995, a Motion for Summary Judgment would be filed. According to the Respondent, it submitted to the Region on September 20, 1995, a facsimile letter denying all charges against the Respondent. The General Counsel's opposition statement asserts that no such facsimile document was received by the Region and notes that, in any event, the Board's Rules and Regulations provide that facsimile transmissions of answers are not acceptable.[2]

Even assuming arguendo that the Respondent's letter dated September 20, 1995, was in fact transmitted to the Region by facsimile on September 20 as the Respondent avers, that document was improper as a facsimile answer to the complaint under former Section 102.114(e) of the Board's Rules and Regulations. Therefore, the Respondent has not filed an answer acceptable under the Board's Rules and Regulations within 14 days from the service of the complaint or within the extended time afforded it. Accordingly, in the absence of good cause being shown for the failure to file an acceptable answer, we grant the General Counsel's Motion for Summary Judgment. *Cable-Masters, Inc.*, 307 NLRB 871 (1992).[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation engaged in the remanufacture of automotive parts, annually purchases and receives at its Tonawanda, New York facility goods and materials valued in excess of $50,000 directly from points located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The partial motion to strike the Respondent's response is denied. We also find it unnecessary to pass on the General Counsel's motion to strike the Respondent's answer because we have found, for the reasons set forth below, that no timely answer was filed.

[2] Former Sec. 102.114(e), which governed the filing of documents at all times relevant to this proceeding, specifically provided that facsimile transmission is not an acceptable means of filing an answer to a complaint. On November 8, 1995, the Board revised its Rules and Regulations pertaining to filing and service of certain documents. Pursuant to these changes, former Sec. 102.114(e) was recodified as Sec. 102.114(g). The revised rules, however, retain the prohibition on facsimile transmission of answers to complaints set forth in former Sec. 102.114(e). We note in any event that the revised rules are not applicable to this case.

[3] In these circumstances, we need not resolve the issue whether the document was, in fact, sent by facsimile on the date in question.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Tonawanda, New York facility; excluding all office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

On March 22, 1995,[4] the Board conducted an election in the unit set forth above and issued a tally of ballots in which challenged ballots were determinative. On July 6, pursuant to a stipulation by the parties approved by the Regional Director for Region 3 on June 23, the determinative challenged ballots were opened and counted and a revised tally of ballots was issued. On July 17, pursuant to the revised tally, the Union was certified as the exclusive collective-bargaining representative of the employees in the unit. At all times material since March 22, the Union has been the exclusive representative of the unit employees pursuant to Section 9(a) of the Act for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. *Unlawful Threats and Promises*

The Respondent's chief executive officer, David Bangert, its president, Scott Bangert, and its plant manager, Terry Battaglia, are supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent for purposes of Section 2(13).

About February 13, the Respondent, acting by David and Scott Bangert, informed an employee that it would be futile for employees to select the Union as their bargaining representative by stating that the Respondent would not recognize the Union.

About February 13, the Respondent, by David Bangert, interrogated an employee about the employee's and other employees' union membership, activities, and sympathies and created the impression of surveillance of employees' union activities; solicited employees' grievances and impliedly promised to rectify those grievances if employees refrained from union organizational activities; and promised an employee that the Respondent would give employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities.

About February 15, the Respondent, by David Bangert, interrogated an employee about the employee's union membership activities and sympathies and the union membership activities and sympathies of other employees and created the impression of surveillance of employees' union activities; and solicited an employee to conduct a meeting with other employees in order to ''bad talk'' the Union and persuade other employees to refrain from union activities.

About February 17, the Respondent, by David Bangert, solicited employees to form and participate in an employee committee and impliedly promised to rectify employee grievances through the committee if employees refrained from union organizational activities; the Respondent, by Scott Bangert, informed its employees that it would be futile to select the Union as their representative by stating that the Respondent would not recognize the Union, threatened employees with plant closure, discharge, layoff, and permanent replacement of all employees if they selected the Union as their representative, and threatened an employee with unspecified reprisals while directing the employee to persuade other employees to refrain from engaging in union activities.

About February 20, the Respondent, by Scott Bangert, directed an employee to distribute to other employees antiunion documents in which the employees would indicate their support for the Union or for the Respondent, and directed the employee to provide Scott Bangert with the results of the poll; the Respondent, by David Bangert, threatened an employee with plant closure, discharge, and permanent replacement if the employees selected the Union as their representative; and informed an employee that it would be futile for employees to select the Union as their bargaining representative by stating that the Respondent would not negotiate with the Union and/or would give a final offer lower than current employees' wages.

Since about February 20, the Respondent has rescinded and/or altered employees' telephone privileges in order to discourage employees from engaging in union activity.

About June 1995, the Respondent, by David Bangert, interrogated an employee about the employee's union activities, membership, and sympathies.

By the foregoing acts and conduct, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, and the Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

C. *Termination of Employee Harris*

On about February 22, the Respondent terminated its employee Michael Harris. The Respondent engaged in

[4] All dates hereafter are in 1995.

this conduct because Harris formed, joined, or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

By the acts and conduct described above, the Respondent has discriminated, and is discriminating, in regard to hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

D. *Refusals to Bargain*

Since about March 24, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the unit.

About March 24, the Respondent laid off employees Thomas Guyatt and William Englert. About April 12, the Respondent laid off employee Jason Williams. About May 17, the Respondent laid off employee John Kratz. These matters relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent concerning this conduct and its effects.

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and the Respondent thereby has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By making threats of futility of representation, plant closure, layoff, discharge, permanent replacement, and unspecified reprisal, by soliciting grievances and promising benefits if employees refrain from union activity, interrogating employees and creating the impression of surveillance of employees' union activities, by soliciting employees to oppose the Union and to persuade others to refrain from engaging in union activities, by soliciting employees to form and participate in an employee committee and promising to rectify grievances through the committee if employees refrain from union activity, by directing employees to poll other employees concerning their union support and to report the results to the Respondent, and by rescinding and/or altering employee telephone privileges in order to discourage union activity, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed by Section 7 of the Act, and the Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By terminating employee Michael Harris because of his union activities and to discourage other employees from engaging in union and protected concerted activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit since March 24, 1995, and by laying off employees Thomas Guyatt, William Englert, Jason Williams, and John Kratz, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to these layoffs and their effects, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging employee Michael Harris, we shall order the Respondent to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Likewise, having found that the Respondent violated Section 8(a)(5) and (1) by laying off employees Thomas Guyatt, William Englert, Jason Williams, and John Kratz, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to these layoffs and their effects, we shall order the Respondent to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the unlawful layoffs.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to the unlawful discharges and layoffs, and to notify the employees in writing that this has been done.

We shall also order the Respondent to reinstate its former telephone use policies.

ORDER

The National Labor Relations Board orders that the Respondent, E. R. Industries, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making threats of futility of representation, plant closure, layoff, discharge, permanent replacement, and other unspecified reprisals.

(b) Soliciting grievances and promising benefits if employees refrain from union activities.

(c) Coercively interrogating any employee about union activities or sentiments.

(d) Creating the impression of surveillance of employees' union activities.

(e) Soliciting employees to oppose the Union and to persuade others to refrain from engaging in union activities.

(f) Soliciting employees to form and participate in an employee committee and promising to rectify grievances through the committee if employees refrain from union activity.

(g) Directing employees to poll other employees concerning their union support and to report the results to it.

(h) Rescinding and/or altering employee telephone privileges in order to discourage union activity.

(i) Discharging or otherwise discriminating against any employee for supporting International Union of United Automobile Workers, AFL–CIO or any other labor organization.

(j) Refusing to bargain with International Union of United Automobile Workers, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(k) Laying off employees in the bargaining unit or making other changes in the rates of pay, wages, hours of employment, and other terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to these changes and their effects.

(l)In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the telephone privileges previously enjoyed by its employees.

(b) Offer Michael Harris immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Tonawanda, New York facility; excluding all office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

(e) Offer Thomas Guyatt, William Englert, Jason Williams, and John Kratz immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the unlawful layoffs, in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its Tonawanda, New York facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT make threats of futility of representation, plant closure, layoff, discharge, permanent replacement, and other unspecified reprisals.

WE WILL NOT solicit grievances and promise benefits if our employees refrain from union activities.

WE WILL NOT coercively interrogate any employee about union activities or sentiments.

WE WILL NOT create the impression of surveillance of employees' union activities.

WE WILL NOT solicit our employees to oppose the Union or to persuade others to refrain from engaging in union activities.

WE WILL NOT solicit employees to form and participate in an employee committee and promise to rectify grievances through the committee if employees refrain from union activity.

WE WILL NOT direct our employees to poll other employees concerning their union support and to report the results to us.

WE WILL NOT rescind and/or alter employee telephone privileges in order to discourage union activity.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting International Union of United Automobile Workers, AFL–CIO or any other labor organization.

WE WILL NOT refuse to bargain with International Union of United Automobile Workers, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT lay off employees in the bargaining unit or make other changes in the rates of pay, wages, hours of employment, and other terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with respect to these changes and their effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the telephone privileges previously enjoyed by our employees.

WE WILL offer Michael Harris immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him

WE WILL remove from our files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, on request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees employed by us at our Tonawanda, New York facility; excluding all office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL offer Thomas Guyatt, William Englert, Jason Williams, and John Kratz immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the unlawful layoffs.

WE WILL remove from our files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

E. R. INDUSTRIES, INC.